



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County
Clerk, individually, in his official capacity,
and on behalf of all other persons
similarly situated,

Appellant,

v.

ROGER G. REDHAIL, individually
and on behalf of all other
persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

THE WISCONSIN
CIVIL LIBERTIES UNION FOUNDATION, INC.
FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE

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FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE

The Wisconsin Civil Liberties Union Foundation,
Inc., respectfully moves, pursuant to Rule 42 of this
Court's rules, to file the within brief *amicus curiae*.
Counsel for appellants and appellees have consented to
the filing of this brief.

The Wisconsin Civil Liberties Union Foundation, Inc. is a private, nonprofit foundation engaged solely in the defense of the Bill of Rights. It is an affiliate of the American Civil Liberties Union. During its history, the Foundation has devoted substantial effort to protecting the rights guaranteed by the United States Constitution. The parties by their attorneys have consented to the filing of an amicus curiae brief by the Wisconsin Civil Liberties Union Foundation, Inc.

Attorney Terry W. Rose, one of the authors of this brief, also represented the plaintiffs in a case entitled *Vernon T. Leipzig, Jr. and Veralyn Randall v. Ruth Pallamolla* in the United States District Court for the Eastern District of Wisconsin, Civil Action File No. 74-C-623. *Leipzig et al vs. Pallamolla* was a companion case decided the same day as *Redhail vs. Zablocki*, 418 F. Supp. 1061 (1976). Leipzig and Randall also commenced an action in the United States District Court for the Eastern District of Wisconsin under 42 U.S.C. Section 1983 challenging the constitutionality of Wisconsin Statutes section 245.10 (1973). The U.S. District Court for the Eastern District of Wisconsin decided that plaintiffs Leipzig and Randall were members of the plaintiff class in *Redhail vs. Zablocki*, Supra, and were entitled to relief as members of the plaintiff's class in *Redhail. Leipzig and Randall vs. Pallamolla* was dismissed as moot on August 31, 1976.

In this brief we demonstrate the broad scope and applicability of section 245.10 (1), (4), and (5), Wisconsin Statutes as applied to a non-indigent person, Vernon T. Leipzig, Jr., who complied with the judgment of divorce and paid child support as required by that judgment. This brief also demonstrates the effect of

Section 245.10 (1), (4) and (5) on Veralyn Randall, Mr. Leipzig's fiance at the time this action was commenced and later his wife during the pendency of their lawsuit.

Respectfully submitted,

/s/ William H. Lynch

William H. Lynch

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Foundation, Inc.

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Attorney for Amicus Curiae

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BRIEF OF THE WISCONSIN CIVIL LIBERTIES
UNION FOUNDATION, INC.,
AMICUS CURIAE

INTEREST OF AMICUS

The interest of *amicus* appears from the foregoing
motion.

WISCONSIN STATUTE INVOLVED

Section 245.10(1), (4) and (5), Wis. Stats.

"245.10 Permission of court required for certain marriages. (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public

charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding under s.52.37 or divorce action of such person in this in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

* * *

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present. (5) This section shall have extraterritorial effect outside the state; and s.245.04(1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere."

ARGUMENT

I. Section 245.10 (1), (4) And (5) Wisconsin Statutes Prohibits Marriage By A Nonindigent, Working Person Who Has Met All Court Imposed Requirements For Support Of Children Of A Previous Marriage Who Are Nonetheless On Welfare.

The *Leipzig et al vs. Pallamolla* case was submitted to the United States District Court on a stipulation of facts. Vernon T. Leipzig, Jr. was previously married to Theresa M. Leipzig. Their marriage was terminated by a judgment of divorce in Kenosha County Court, Kenosha County, Wisconsin on May 24, 1974. Mr. Leipzig had the obligation to support four minor children of that marriage. His four minor children were in the custody of his ex-wife. The divorce judgment required him to pay child support in the amount of \$60 per week. The divorce judgment did not award alimony to Leipzig's ex-wife. Vernon T. Leipzig, Jr. petitioned the County Court, Branch 2, Kenosha County, Wisconsin, pursuant to Section 245.10(1) of the Wisconsin Statutes for permission to marry Veralyn Randall. Ms. Randall signed said petition wherein she stated that she was engaged to be married to Mr. Leipzig. This petition was heard before the County Court on December 13, 1974. Mr. Leipzig's ex-wife signed an affidavit which was filed with the County Court stating that Mr. Leipzig was not in default of payment of child support as ordered by the Kenosha County Court for the support of

their minor children and she consented to an immediate hearing and that an order issue granting Leipzig's petition to remarry without her objection.

On December 13, 1974 Mr. Leipzig's ex-wife received welfare assistance pursuant to the A.F.D.C. program for the support and maintenance of herself and the parties' four minor children. She received a check solely for the support of the four minor children in the amount of \$355.00 per month. Since Mr. Leipzig's ex-wife had remarried she did not receive any money for herself under the A.F.D.C. program. Since she had the custody of the four minor children she was not required by Section 245.10, Wisconsin Statutes, to obtain court permission to remarry. The right to support payments of \$60.00 per week being made by Mr. Leipzig pursuant to the divorce judgment had been assigned to the Kenosha County Department of Health and Social Services by the former Mrs. Leipzig. Mr. Leipzig paid the child support out of his income he received as a deputy sheriff for Kenosha County, Wisconsin. The Kenosha County Court denied the application of Mr. Leipzig for permission to marry Ms. Randall pursuant to Section 245.10 of the Wisconsin Statutes for the reason that the four minor children of Mr. Leipzig were receiving public welfare even though Mr. Leipzig was current in the payment of all court ordered child support. Therefore, Mr. Leipzig and Ms. Randall were unable to obtain a valid marriage license from County Clerk Ruth Pallamolla or any other county clerk in the state of Wisconsin for the reason that they were unable to satisfy the requirements of Section 245.10.

During the pendency of the *Leipzig et al vs. Pallamolla* case in the U.S. District Court for the

Eastern District of Wisconsin Vernon T. Leipzig and Veralyn Randall married in Antioch, Illinois. Also during the pendency of that action Mrs. Leipzig became pregnant and a child was born.

II. Section 245.10 (1), (4) And (5) Wisconsin Statutes Is An Unconstitutional Infringement On The Fundamental Right To Marry.

The State of Wisconsin in adopting Section 245.10 (1), (4) and (5) Wisconsin Statutes has infringed on the fundamental right to marry. It prohibits people like Vernon T. Leipzig, Jr. and Veralyn Randall from legally marrying in Wisconsin solely because his children by his former marriage are receiving public welfare. Even though Mr. Leipzig married Veralyn Randall in Antioch, Illinois that marriage is void according to Wisconsin Statute, Section 245.10(5). The statute applies to all Wisconsin residents having minor issue not in that person's custody in which that person is under an obligation to support by any court order or judgment. Thus the marriage of Vernon T. Leipzig, Jr. in Antioch, Illinois is a void marriage and the child born to them illegitimate.

Marriage is a basic right guaranteed by the First and Fourteenth Amendments to the United States Constitution. In *Griswold vs. Connecticut*, 381 U.S. 479, 14 L.Ed. 2d 510, 516 (1965), the United States Supreme Court stated that marriage "is an association for as noble a purpose as any involved in our prior decisions." In *Loving vs. Virginia*, 388 U.S. 1, 18 L.Ed. 2d, 1010, 1018 (1967) the Supreme Court stated "The freedom to

marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival. *Skinner vs. Oklahoma*, 316 U.S. 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942)." In other words the United States Supreme Court has recognized that the right to marry existed prior to our Constitution. It is one of the basic civil rights of all people. In *Meyer vs. Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 1045 (1923) Justice McReynolds defined the liberty guaranteed by the Fourteenth Amendment. He wrote "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." On these and other occasions the United States Supreme Court has recognized the fundamental importance of the marital relationship under our Constitution. See also *Skinner vs. Oklahoma*, 316 U.S. 535, 86 L.Ed. 1655, 1660 (1942); *Eisenstadt vs. Baird*, 405 U.S. 438, 31 L.Ed. 2d 349 (1972); *Boddie vs. Connecticut*, 401 U.S. 371, 374, 28 L.Ed. 2d 113 (1971); *United States vs. Kras*, 409 U.S. 434, 34 L.Ed. 2d 626 (1973).

The right to marry is "imbedded in the First Amendment." And the United States Supreme Court regards it as "fundamental" and requires "the lofty requirement of a compelling governmental interest before (it) may be significantly regulated." *United States vs. Kras*, 409 U.S. 434, 446, 34 L.Ed. 2d 626, 636

(1973). The State of Wisconsin has contended that Section 245.10 Wisconsin Statutes encourages ex-spouses to increase their child support payments so that their children will not receive public welfare and further will pay any support arrearages accrued during periods of non-payment. However, there are other means to compel payment by a non-paying person who is under an obligation to support his minor children. These other methods of compelling support do not infringe upon the fundamental right to marry. A Wisconsin trial court can order a wage assignment for the spouse who fails to comply with payment of support. Section 247.265, Wisconsin Statutes. Section 247.37 (1) (a), Wisconsin Statutes, further provides that disobedience of a court judgment with respect to payment of alimony or support is punishable under Section 295.03, Wisconsin Statutes, by commitment to the county jail or house of correction until such judgment is complied with and the costs and expenses of the proceeding are paid or until the party committed is otherwise discharged according to law. This is the traditional contempt proceeding under Chapter 295 of the Wisconsin Statutes. Without Section 245.10 (1), (4) and (5), Wisconsin Statutes, the State of Wisconsin and persons who have custody of minor children have strong tools at their disposal to require a non-paying ex-spouse to support a family. These strong tools do not infringe upon the fundamental right of marriage.

The sweep of Section 245.10 (1), (4) and (5), Wisconsin Statutes, is too broad. It penalizes one like Vernon T. Leipzig, Jr. who has complied with the divorce judgment by paying the court ordered child support of \$60 per week at the time that he petitioned the County Court to marry on December 13, 1974. The

\$60 per week may be insufficient to support the four minor children by his prior marriage but it is the sum that was ordered by the County Court in the divorce judgment. The State of Wisconsin cannot show a sufficient countervailing justification for prohibiting the marriage of Vernon T. Leipzig, Jr. and Veralyn Randall and other cases where minor children by a prior marriage are being supported by public welfare in light of the fact that there are available to the State of Wisconsin less restrictive means of collecting support which do not interfere with the constitutionally guaranteed right of marriage.

The breadth and scope of Section 245.10 (5), Wisconsin Statutes, is demonstrated by Mr. Leipzig when he entered into a void marriage in Antioch Illinois with Veralyn Randall. Since the marriage is void, the child born to them is also illegitimate. The statute therefore not only affects the person who has complied with court ordered support but it affects Ms. Randall and now their child.

III. Section 245.10 (1), (4) and (5), Wisconsin Statutes, Denies Equal Protection Of The Laws As Guaranteed By The Fourteenth Amendment.

The challenged Wisconsin Statutes prohibit Vernon T. Leipzig from marrying because his children by a prior marriage are receiving public welfare. We contend that the applicability of Section 245.10 (1), (4) and (5), Wisconsin Statutes, denies equal protection of the laws as guaranteed by the Fourteenth Amendment. "The reach of the equal protection clause is not definable

with mathematical precision. But in spite of doubts by some, as it has been construed, rather definite guidelines have been developed; race is one ... alienage is another ... religion is another ... poverty is still another (*Griffin vs. Illinois*, Supra); and class or caste is yet another (*Skinner vs. Oklahoma*, 316 U.S. 535)." *Boddie vs. Connecticut*, 410 U.S. 371, 385 (1971) Justice Douglas concurring. For members of the appellee class such as Vernon T. Leipzig the invidious discrimination is based on relative poverty. The affluent can marry but the hard working nonindigent law enforcement officer who has done all the divorce court has required cannot. In *Griffin vs. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 898 (1956) the Supreme Court ruled "In criminal trials the state can no more discriminate on account of poverty than on account of religion, race or color." Likewise we contend in marriage the State can no more discriminate on account of poverty than on account of religion, race or color." See also *Loving vs. Virginia*, 388 U.S. 1, (1967); *Williams vs. Illinois*, 399 U.S. 235, 241 (1970). The gravamen of our claim is total deprivation of Leipzig and Randall's right to marry. Section 245.10 (1), (4) and (5), Wisconsin Statutes, totally bars their marriage so long as his children are receiving public welfare or likely to receive it. *c.f. Sosna vs. Iowa*, 419 U.S. 393, 42 L. Ed. 2nd 532 (1975). In the case of persons unable to pay sufficient support to prevent children not in their custody from becoming public charges, the Wisconsin Statutes Section 245.10 (1), (4) and (5) is an unconstitutional discrimination against the poor who are deprived of the basic constitutional right to marry.

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

Respectfully submitted,

/s/ Terry W. Rose

TERRY W. ROSE

/s/ William H. Lynch

WILLIAM H. LYNCH

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APPENDIX

APPENDIX INDEX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STIPULATED FACTS

VERNON T. LEIPZIG, JR. and Case No. 74-C-263
VERALYN RANDALL,

Plaintiffs,

vs.

EDWARD J. WAVRO, Individually
and as County Clerk for
Kenosha County, Wisconsin,

Defendant.

It is stipulated and agreed by and between the parties above named by their respective undersigned attorneys that the following facts are stipulated to by the parties by their attorneys for consideration by the court in the above entitled matter:

1. Plaintiffs are adult residents of Kenosha County, State of Wisconsin. Plaintiff Vernon T. Leipzig, Jr. is employed as a deputy sheriff for Kenosha County, Wisconsin.

2. Defendant is county clerk for Kenosha County, Wisconsin and resides in Kenosha, Wisconsin.

3. Defendant in his capacity as county clerk for Kenosha County, Wisconsin, is responsible for the issuance of marriage licenses in Kenosha County, Wisconsin, pursuant to Section 245.05 of the Wisconsin Statutes.

4. Plaintiff Vernon T. Leipzig, Jr. was previously married to Theresa M. Leipzig of Kenosha County, Wisconsin and that marriage was terminated by a judgment of divorce which was granted on May 24, 1974 in County Court for Kenosha County, Wisconsin. The plaintiff, Vernon T. Leipzig, Jr. has the obligation to support the following minor children of said marriage and that said children are not in his custody and in the custody of his ex-wife, Theresa M. Leipzig, now known as Theresa M. Kuchinski:

	<i>Age</i>	<i>Birthdate</i>
Kim Leipzig	9	September 18, 1965
Keith Leipzig	4	February 26, 1970
Karla Leipzig	6	December 28, 1968
Kelly Leipzig	3	June 14, 1972

5. Plaintiff Vernon T. Leipzig, Jr. was ordered by the County Court for Kenosha County, Wisconsin to pay \$60.00 per week as child support for the support and maintenance of the four minor children in his ex-wife's custody. The divorce judgment did not award alimony to the ex-wife of the plaintiff, Vernon T. Leipzig, Jr.

6. Plaintiff Vernon T. Leipzig, Jr. petitioned the County Court, Branch 2, Kenosha County, Wisconsin pursuant to Section 245.10 (1) of the Wisconsin Statutes for permission to marry plaintiff Veralyn Randall. Plaintiff Veralyn Randall signed said petition wherein she stated that she was engaged to be married to plaintiff Vernon T. Leipzig, Jr. Said petition was heard by the Honorable John J. Crosetto, Kenosha County judge, on December 13, 1974 at 8:30 A.M. Plaintiff Vernon T. Leipzig, Jr.'s ex-wife signed an affidavit

which was filed with the Kenosha County Court stating that the plaintiff, Vernon T. Leipzig, was not in default of payment of child support as ordered by the Kenosha County Court for the support of their minor children and she consented to an immediate hearing and further that an order may issue for plaintiff Vernon T. Leipzig, Jr.'s remarriage without her objection.

7. That when plaintiff Vernon T. Leipzig, Jr. petitioned the Kenosha County Court for permission to marry on December 13, 1974 he was not in default in payment of his child support of \$60.00 per week.

8. That on December 13, 1974 plaintiff Vernon T. Leipzig, Jr.'s ex-wife received welfare assistance pursuant to the A.F.D.C. program for the support and maintenance of herself and the parties' four minor children. Presently plaintiff Vernon T. Leipzig, Jr.'s ex-wife receives a check solely for the support of the four minor children under the A.F.D.C. program, said sum of support for the children being \$355.00 per month. Since plaintiff Vernon T. Leipzig, Jr.'s ex-wife has remarried she does not receive any money for herself under the A.F.D.C. program.

9. The right to support payments of \$60.00 per week being made by plaintiff Vernon T. Leipzig, Jr. Pursuant to the divorce judgment aforementioned has been assigned to the Kenosha County Department of Health and Social Services.

10. That following the hearing before the County Court, Branch 2, Kenosha County, Wisconsin on December 13, 1974 the Court denied the application of plaintiff Vernon T. Leipzig, Jr. for permission to marry plaintiff Veralyn Randall pursuant to Section 245.10 of the Wisconsin Statutes for the reason that the four

minor children of plaintiff Vernon T. Leipzig, Jr. are receiving public welfare.

11. The plaintiffs are unable to obtain a valid marriage license from defendant or any other county clerk in the State of Wisconsin for the reason that they are unable to satisfy the requirement of Section 245.10.

Dated at Kenosha, Wisconsin this 20th day of February, 1975.

COTTON, ROSE & ROSE

By /s/ Terry W. Rose

Terry W. Rose

Attorneys for Plaintiffs

/s/ Joseph Salituro

Joseph Salituro

Attorney for Defendant

Dated at Madison, Wisconsin this 21st day of February, 1975.

/s/ Ward Johnson

Ward Johnson,

Assistant Attorney General for
the State of Wisconsin, of
counsel for defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

VERNON T. LEIPZIG, JR.
and VERALYN RANDALL,

Plaintiffs,

Civil Action

vs

No. 74-C-623

RUTH PALLAMOLLA,

Defendant.

ORDER

Before TONE, Circuit Judge, and REYNOLDS and WARREN, District Judges.

This is an action brought under 42 U.S.C. 1983 challenging the constitutionality of a Wisconsin statute, Section 245.10 (1973), which requires certain Wisconsin residents to obtain court permission before they can marry. In a companion case decided this day, *Redhail v. Zablocki*, C.A. No. 74-C-624 (E.D. Wis.), we held Section 245.10 (1), (4), and (5) unconstitutional under the equal protection clause of the Fourteenth Amendment. There we defined the plaintiff class as follows:

"All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to Section 245.10 (1), Wis. Stats. (1971)."

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Because plaintiffs in this action fit the above description and are entitled to relief as members of the plaintiff's class in *Redhail*, this individual action is hereby dismissed as moot.

Dated at Milwaukee, Wisconsin this 31st day of August, 1976.

/s/ Philip W. Tone

Philip W. Tone, Judge of the
U.S.

Court of Appeals for the
Seventh Circuit

/s/ John W. Reynolds

John W. Reynolds, Chief Judge,
U.S. District Court

/s/ Robert W. Warren

Robert W. Warren, Judge,
U.S. District Court

A-7

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

VERNON T. LEIPZIG, JR. AND
VERALYN RANDALL,

Plaintiffs

vs.

RUTH PALLAMOLLA,

Defendant

JUDGMENT

74-C-623

JUDGMENT

This action came on for hearing before the court, Honorable Philip W. Tone, John W. Reynolds, Robert W. Warren, judges, presiding, and a decision having been duly rendered.

It is Ordered and Adjudged: that the above-entitled action is hereby dismissed.

Dated at Milwaukee, Wisconsin, this 31st day of August, 1976.

/s/ Ruth W. LaFave
Clerk of Court